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No. 87-781

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOYCE ATKINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a Federal Tort Claims Act suit alleging malpractice in the treatment of an active-duty service member in a military hospital is barred by *Feres* v. *United States*, 340 U.S. 135 (1950).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A12) is reported at 825 F.2d 202.[1] The opinion of the district court (Pet. App. A35-A43) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on August 13, 1987. The petition for a writ of certiorari was filed on November 12, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a Specialist (4th Class) on active duty with the Army in Hawaii, while in the second trimester of

[1] A previous opinion of the court of appeals (Pet. App. A16-A34) that was reported at 804 F.2d 561 and modified at 813 F.2d 1006 (Pet. App. A14-A15) has been withdrawn.

pregnancy, twice in four days reported to Tripler Army Medical Center with hypertension and other complaints, and was sent home without treatment. Two weeks later, she reported again, complaining of severe abdominal pain and hypertension, was hospitalized, and subsequently delivered a stillborn child. In this action, petitioner has alleged malpractice and sought recovery from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* Pet. App. A4-A5.

The district court, following *Feres* v. *United States*, 340 U.S. 135 (1950), found that petitioner had been injured in the course of activity incident to military service, and dismissed her action (Pet. App. A35-A43). The district court noted that *Feres* itself involved medical malpractice claims. The court of appeals reversed (*id.* at A16-A34). It distinguished *Feres* by stating: "[P]regnant servicewomen did not serve on active duty in 1950 when *Feres* was decided. Thus, the Supreme Court, in barring the two malpractice claims involved in *Feres*, could not have had in mind the unique facts involved in [petitioner's] claim." *Id.* at A29. On petition for rehearing, the court, following the decision of this Court in *United States* v. *Johnson,* No. 85-2039 (May 18, 1987), withdrew it prior decision and affirmed the dismissal of petitioner's claim (Pet. App. A2-A13).

ARGUMENT

The court of appeals' decision is plainly correct and further review is not warranted. The precise question presented – whether an active-duty service member may bring an action for damages under the FTCA alleging malpractice during medical treatment at a military hospital – was addressed by the Court in *Feres*. The Court unequivocally answered in the negative. It recognized that

"[i]n the usual civilian doctor and patient relationship, there is of course a liability for malpractice" (340 U.S. at 142). But the Court concluded, after analysis of the FTCA, that "[n]o federal law recognizes a recovery such as claimants seek" (*id.* at 144). Rather, the Court held, Congress did not intend the FTCA "to permit recovery for injuries incident to military service" (*ibid.*).

Petitioner contends (Pet. 8-11) that *Feres* was incorrectly decided. But this Court reaffirmed *Feres* last Term in *Johnson*, stating: "In *Feres*, this Court held that service members cannot bring tort suits against the Government for injuries that 'arise out of or are in the course of activity incident to service.' This Court has never deviated from this characterization of the *Feres* bar. Nor has Congress changed this standard in the close to 40 years since it was articulated, even though, as the Court noted in *Feres*, Congress 'possesses a ready remedy' to alter a misinterpretation of its intent." Slip op. 4-5 (citation and footnote omitted). Petitioner advances no reason for the Court to reconsider that conclusion at this time; indeed, petitioner advances no argument not offered to the Court for its consideration in *Johnson*.

Accordingly, there is no "special justification" (*Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984)) demanding a departure from the doctrine of stare decisis in this case. Moreover, since "[t]he doctrine of *stare decisis* has a more limited application when the precedent rests on constitutional grounds, because 'correction through legislative action is practically impossible' " (*Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 272-273 n.18 (1980) (plurality opinion), quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)), it follows that stare decisis demands that there be a particularly strong basis for departing from a prior interpretation of a statute. Here, where the statute at issue was con-

strued by this Court in *Feres* a few years after its enactment and Congress has not revised the FTCA to overrule *Feres*, there is plainly no basis for reconsideration by this Court.[2]

Petitioner also argues (Pet. 11-14) that *United States* v. *Shearer*, 473 U.S. 52 (1985), requires a case-by-case determination of the applicability of *Feres*. Petitioner misunderstands this Court's decision in *Shearer*, which requires not a consideration of the precise litigation anticipated, but rather a consideration of the *type* of claim involved, to determine whether such claims are barred by *Feres*. This Court in *Johnson* reaffirmed that conclusion, stating that "injuries incurred incident to service are barred by the *Feres* doctrine because they are the '*type[s]* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.' " Slip op. 9 (quoting *Shearer*, 473 U.S. at 59 (emphasis in original)). Nothing could be more firmly established than that malpractice claims such as that advanced here, involving medical treatment of an active-duty service member at a military hospital, are among the types of claims covered by *Feres*, since *Feres* itself involved such claims.

Finally, petitioner renews (Pet. 14-18) the argument advanced in the court of appeals' withdrawn opinion that the Court in *Feres* could not have been considering cases involving medical treatment of pregnant service members because pregnant women could not serve on active duty in the Army in 1950. That argument plainly relies on a distinction without a difference.

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[2] As petitioner notes (Pet. 9 n.2), Congress is again considering legislation that would permit medical malpractice suits by service members in some instances. That simply reinforces the conclusion that, since Congress is well aware of the *Feres* decision and can modify its effects if it chooses to do so, this Court should not depart from the rule of stare decisis.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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